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**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BOUNDARY**

ANNEXATION OPPOSITION GROUP, an
 Idaho unincorporated non-profit organization,

Petitioner,

v.

CITY OF BONNERS FERRY, an Idaho
 Municipal corporation; MAYOR DAVID
 ANDERSON; CITY COUNCIL PRESIDENT
 CHRIS CLARK; CITY COUNCIL
 MEMBERS MIKE KLAUS, CONNIE
 WELLS and TOM MAYO, all in their official
 Capacities,

Respondents.

CASE NO. CV2012-00002

MEMORANDUM OPINION
 AND ORDER ON PETITION
 FOR JUDICIAL REVIEW

This matter came before the Court for hearing on October 12, 2012 on Petition for Judicial Review of the City of Bonners Ferry's Annexation Ordinance 529. Petitioner Annexation Opposition Group was represented by attorney Fonda Jovick. The City of Bonners Ferry et al. were represented by attorney William L. Herrington. The Court, having reviewed the September 29, 2011 Planning & Zoning public hearing transcripts, the November 14 and 15, 2011 City Council public hearing transcripts, the Clerk's Record, and the briefs filed by the parties, having heard oral arguments of counsel, and being fully advised in the matter, hereby renders its decision.

FACTUAL AND PROCEDURAL BACKGROUND

On October 13, 2011, the City of Bonners Ferry ("City") published a notice of intent to annex approximately seventy-seven (77) parcels of real property located within Boundary County and adjacent to but outside the City limits.¹ The City's Planning and Zoning Commission held a public hearing regarding the annexation on September 29, 2011.² Prior to the public hearing, the Planning and Zoning Commission received a number of letters from affected property owners opposing the proposed annexation and a Petition in opposition was presented to the Commission at the hearing.³ Following the public hearing, the Planning and Zoning Commission found the proposed annexation met the Cities' comprehensive plan by a vote of four to two, but voted to recommend the City not proceed with the proposed annexation by a vote of four to one with one commission abstaining.⁴

The matter then went before the City Council for public hearing on November 14, 2011. Prior to the City Council meeting, letters in opposition to the annexation⁵ were received and a Petition in opposition was presented to the City Council⁶ during the meeting. Discussions regarding the proposed annexation reconvened on November 15, 2011, and ended with the City Council voting to annex seventy-six (76) of the proposed parcels by a vote of three to one.⁷ On December 6, 2011, Ordinance No. 529 was enacted annexing the real property at issue.

¹ Clerk's Record p. 30.

² Clerk's Record pp. 110-119..

³ Clerk's Record pp. 87-102 and 105-108.

⁴ Clerk's Record p. 119. One member of the Planning and Zoning Commission abstained from voting on whether to recommend the City proceed with annexation.

⁵ Clerk's Record pp. 144-179.

⁶ Clerks Record pp. 275-277.

⁷ Clerk's Record p. 291.

STANDARD OF REVIEW

Judicial review of a city's annexation and initial zoning is only available if such right is granted by a statute. *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 960–61, 188 P.3d 900, 902–03 (2008) (citing *Gibson v. Ada Cnty. Sheriff's Dep't.*, 139 Idaho 5, 8, 72 P.3d 845, 848 (2003)). The parties agree the annexation at issue was done as a category B annexation pursuant to I.C. § 50-222. Judicial review of a category B annexation is provided for by statute. "The decision of a city council to annex and zone lands as a category B or category C annexation shall be subject to judicial review in accordance with the procedures provided in chapter 52, title 67, Idaho Code, and pursuant to the standards set forth in section 67-5279, Idaho Code. . . ." I.C. § 50-222(6).

ANALYSIS

Plaintiff Annexation Opposition Group filed the above entitled Petition for Judicial Review on January 3, 2012. There is no dispute that the Petition was timely filed. However, Respondents contend Plaintiff is not "an affected person" and, therefore, is without standing to petition for judicial review. This issue was raised previously by Respondent, thus triggering Plaintiff to file sworn affidavits from three of its members stating they hold ownership interest in property subject to the annexation. On appeal, Plaintiff contends that it has standing pursuant to I.C. § 53-707, which reads in relevant part:

A nonprofit association may assert a claim in its name on behalf of its members if one (1) or more members of the nonprofit association have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes and neither the claim asserted nor the relief requested requires the participation of a member.

I.C. § 53-707(2).

This Court is persuaded that Plaintiff has standing to bring the above-entitled action pursuant to I.C. § 53-707, as there is no dispute that Plaintiff is a non-profit association and that one or more of its members has standing in his or her own right to assert the claim.

The annexation in the instant matter was a category B annexation initiated pursuant to I.C. § 50-222. The Legislative intent in enacting I.C. § 50-222 is found within the statute.

The legislature hereby declares and determines that it is the policy of the state of Idaho that cities of the state should be able to annex lands which are reasonably necessary to assure the orderly development of Idaho's cities in order to allow efficient and economically viable provision of tax-supported and fee-supported municipal services, to enable the orderly development of private lands which benefit from the cost-effective availability of municipal services in urbanizing areas and to equitably allocate the costs of public services in management of development on the urban fringe.

I.C. § 50-222(1).

The statute then articulates in detail the procedures to be followed in a category B annexation.

(b) Procedures for category B annexations: A city may annex lands that would qualify under the requirements of category B annexation if the following requirements are met:

- (i) The lands are contiguous or adjacent to the city and lie within the city's area of city impact;
- (ii) The land is laid off into lots or blocks containing not more than five (5) acres of land each, whether the same shall have been or shall be laid off, subdivided or platted in accordance with any statute of this state or otherwise, or whenever the owner or proprietor or any person by or with his authority has sold or begun to sell off such contiguous or adjacent lands by metes and bounds in tracts not exceeding five (5) acres, or whenever the land is surrounded by the city. Splits of ownership which occurred prior to January 1, 1975, and which were the result of placement of public utilities, public roads or highways, or railroad lines through the property shall not be considered as evidence of an intent to develop such land and shall not be sufficient evidence that the land has been laid off or subdivided in lots or blocks. A single sale after January 1, 1975, of five (5) acres or less to a family member of the owner for the purpose of constructing a residence shall not constitute a sale within the meaning of this section. For purposes of this section, "family member" means a natural person or the spouse of a

natural person who is related to the owner by blood, adoption or marriage within the first degree of consanguinity;

(iii) Preparation and publication of a written annexation plan, appropriate to the scale of the annexation contemplated, which includes, at a minimum, the following elements:

(A) The manner of providing tax-supported municipal services to the lands proposed to be annexed;

(B) The changes in taxation and other costs, using examples, which would result if the subject lands were to be annexed;

(C) The means of providing fee-supported municipal services, if any, to the lands proposed to be annexed;

(D) A brief analysis of the potential effects of annexation upon other units of local government which currently provide tax-supported or fee-supported services to the lands proposed to be annexed; and

(E) The proposed future land use plan and zoning designation or designations, subject to public hearing, for the lands proposed to be annexed;

(iv) Compliance with the notice and hearing procedures governing a zoning district boundary change as set forth in section 67-6511, Idaho Code, on the question of whether the property should be annexed and, if annexed, the zoning designation to be applied thereto; provided however, the initial notice of public hearing concerning the question of annexation and zoning shall be published in the official newspaper of the city and mailed by first class mail to every property owner with lands included in such annexation proposal not less than twenty-eight (28) days prior to the initial public hearing. All public hearing notices shall establish a time and procedure by which comments concerning the proposed annexation may be received in writing and heard and, additionally, public hearing notices delivered by mail shall include a one (1) page summary of the contents of the city's proposed annexation plan and shall provide information regarding where the annexation plan may be obtained without charge by any property owner whose property would be subject to the annexation proposal.

(v) In addition to the standards set forth elsewhere in this section, annexation of the following lands must meet the following requirements:

(A) Property, owned by a county or any entity within the county, that is used as a fairgrounds area under the provisions of chapter 8, title 31, Idaho Code, or chapter 2, title 22, Idaho Code, must have the consent of a majority of the board of county commissioners of the county in which the property lies; and

(B) Property, owned by a nongovernmental entity, that is used to provide outdoor recreational activities to the public and that has been designated as a planned unit development of fifty (50) acres or more and does not require or utilize any city services must have the express written permission of the nongovernmental entity owner.

(vi) After considering the written and oral comments of property owners whose land would be annexed and other affected persons, the city council

may proceed with the enactment of an ordinance of annexation and zoning. In the course of the consideration of any such ordinance, the city must make express findings, to be set forth in the minutes of the city council meeting at which the annexation is approved, as follows:

- (A) The land to be annexed meets the applicable requirements of this section and does not fall within the exceptions or conditional exceptions contained in this section;
- (B) The annexation would be consistent with the public purposes addressed in the annexation plan prepared by the city;
- (C) The annexation is reasonably necessary for the orderly development of the city;
- (vii) Notwithstanding any other provision of this section, railroad right-of-way property may be annexed pursuant to this section only when property within the city adjoins or will adjoin both sides of the right-of-way.

I.C. § 50-222(5)(b).

On Petition for Judicial Review, Plaintiff contends: (1) the mandatory report required in I.C. § 50-222(5)(b)(iii) was deficient, (2) the City failed to make express findings as required by I.C. § 50-222(5)(b)(vi), (3) the annexation was an unreasonable exercise of governmental powers in violation of public policy, and (4) the annexation triggered a material breach of contract between the City and the affected residents. The Court will address the issues in the order presented by Plaintiff.

Idaho Code § 50-222 requires the preparation and publication of a written annexation plan appropriate to the scale of the annexation and that it include at minimum: (a) the manner of providing tax-supported municipal services to the proposed annexation lands, (b) the changes in taxation and other costs that would result with annexation with examples, (c) the means of providing fee-supported municipal services if any, (d) a brief analysis of the potential effects of the annexation on other units of local government currently providing tax-supported or fee-supported services to the proposed annexation lands, and (e) the proposed future land use plan

and zoning designations. I.C. § 50-222(5)(b)(iii). In the instant matter, the City prepared and published a written annexation plan.⁸

The written plan indicates seventy-seven (77) parcels are proposed for annexation, notes the general location of the parcels, and includes a map as an appendix. The plan further notes the proposed annexation parcels already receive City provided water, sewer and electricity and, that after annexation, the City would provide fire protection, police protection, garbage collection, and street maintenance. The plan then lists the means by which tax-supported fire services, police services, and road maintenance will be provided.⁹ The plan next addresses fee-supported services of water, sewer, electricity, and garbage collection. The plan states the proposed annexation parcels will see no change in fees for water and sewer, fees for electricity will be reduced with annexation, garbage collection fees will be added but solid waste fees will be lower than the same fee for County residents.¹⁰ The next section in the plan lists the effects of annexation on property taxes and provides examples based on five value categories.¹¹ The plan then addresses various other units of government providing services to County residents, how those government units will be impacted by annexation, and how the proposed annexation parcels will be financially impacted, if at all.¹² Lastly, the City's written annexation plan addresses proposed future land use and zoning designations by providing a map showing the current uses and zoning within the City and the uses and zoning proposed for those adjacent parcels subject to the proposed annexation.¹³

⁸ Clerk's Record pp.264-271. I.C. § 50-222(5)(b)(iii).

⁹ Clerk's Record pp. 265 & 267-268. I.C. § 50-222(5)(b)(iii)(A).

¹⁰ Clerk's Record pp. 265 & 267-268. I.C. § 50-222(5)(b)(iii)(C).

¹¹ Clerk's Record pp. 266 & 268-269. I.C. § 50-222(5)(b)(iii)(B).

¹² Clerk's Record p. 269 I.C. § 50-222(5)(b)(iii)(D).

¹³ Clerk's Record pp. 269-271. I.C. § 50-222(5)(b)(iii)(E).

The written annexation plan prepared and published by the City meets the required elements of I.C. § 50-222(5)(b). Nevertheless, Plaintiff contends the plan is deficient, arguing the plan fails to include a statement of financial impact to the City.¹⁴ While there may be merit to Plaintiff's concern given the financial tightrope many governmental entities are walking as a result of the country's economic downturn, it is nevertheless without any legal basis, as there is no statutory obligation to include such information in a category B annexation plan. The Court, therefore, finds the City's written plan meets the statutory requirements.

Plaintiff next contends the City failed to make the express findings required by I.C. § 50-222(5)(b)(vi), which reads:

After considering the written and oral comments of property owners whose land would be annexed and other affected persons, the city council may proceed with the enactment of an ordinance of annexation and zoning. In the course of the consideration of any such ordinance, *the city must make express findings, to be set forth in the minutes of the city council meeting at which the annexation is approved*, as follows:

- (A) The land to be annexed meets the applicable requirements of this section and does not fall within the exceptions or conditional exceptions contained in this section;
- (B) The annexation would be consistent with the public purposes addressed in the annexation plan prepared by the city;
- (C) The annexation is reasonably necessary for the orderly development of the city;

I.C. § 50-222(5)(b)(vi) [emphasis added].

On November 15, 2011, following the public hearing on the proposed annexation, the City council went into executive session and voted in favor of annexing seventy-six of the proposed seventy-seven parcels of property. On December 6, 2011, the City executed Ordinance No. 529, which enacted the annexation. However, neither the November 15, 2011 nor the

¹⁴ Plaintiff attempts to support the argument by directing the Court to a letter written to the City from disgruntled residents impacted by a 2001 annexation. Plaintiff then encourages the Court to imply from the residents' discontent that the City is financially unsound. The Court, having been presented with no evidence that the City's financial position is unsound or precarious, declines to make such an assumption.

December 6, 2011 City council minutes include the express findings required by I.C. § 50-222(5)(b)(vi). In briefing, counsel for the City argues that certain statements made by members of the City council and the City's staff during the public hearing meet the express findings requirements, contending the statements address the specific findings required to be set forth in the minutes. The Court is not persuaded. Under the most generous interpretation, the statements fall far short of the mandatory express findings required by the statute. The task the statute assigns to city councils - that they set forth *express* findings in their minutes that the applicable requirements of the annexation have been met, that annexation is consistent with the public purposes addressed in the annexation plan, and that annexation is reasonably necessary for the orderly development of the city - is not an onerous task, but it is a mandatory one. In the instant matter, the Bonners Ferry City council simply failed to comply with statutory requirements to set forth in the minutes the necessary *express* findings and, as a result, Ordinance No. 529 is invalid.

CONCLUSION

Plaintiff raises two additional issues on Petition for Judicial Review: (1) that the annexation was an unreasonable exercise of governmental powers in violation of public policy and (2) the annexation triggered a material breach of contract between the City and the affected residents. The Court finds it unnecessary to address the two additional issues raised, as the Court finds Ordinance No. 529 invalid based on the City council's failure to set forth in its minutes the mandatory express findings required by I.C. § 50-222(5)(b)(vi).

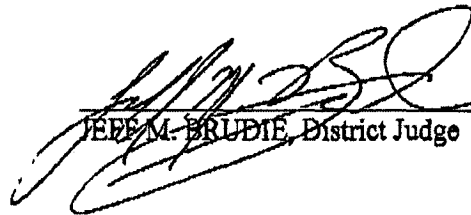
Plaintiff asks the Court for an award of costs and attorney fees on appeal. The Court finds there is no provision for such an award in the instant matter.

ORDER

It is hereby the finding of the Court that the attempted annexation by the City of Bonners Ferry, resulting in enactment of Ordinance No. 529, did not comply with I.C. § 50-222(5)(b)(vi) and is, therefore, invalid.

Plaintiff's request for an award of costs and fees on appeal is DENIED.

Dated this 26 day of November 2012.


JEFF M. BRUDIE, District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION AND ORDER was:

✓ hand delivered via court basket, or *faxed* ✓

 mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 27th day of November, 2012, to:

Fonda Jovick
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Boundary County District Court
FAX: (208) 267-7814

PATTY O. WEEKS, CLERK

By *[Signature]*
Deputy

